

Steven L. Holley (*pro hac vice* pending)  
(holleys@sullcrom.com)  
Shane M. Palmer (SBN 308033)  
(palmersh@sullcrom.com)  
SULLIVAN & CROMWELL LLP  
125 Broad Street  
New York, New York 10004  
Telephone: (212) 558-4000  
Facsimile: (212) 558-3588

Brendan P. Cullen (SBN 194057)  
(cullenb@sullcrom.com)  
SULLIVAN & CROMWELL LLP  
1870 Embarcadero Road  
Palo Alto, California 94303  
Telephone: (650) 461-5600  
Facsimile: (650) 461-5700

*Attorneys for Non-Party Spotify USA Inc.*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

EPIC GAMES, INC.,

Plaintiff,

v.

APPLE INC.

Defendant.

Case No. 4:20-cv-05640-YGR-TSH

**DECLARATION OF BENJAMIN KUNG  
PURSUANT TO CIVIL LOCAL RULE  
79-5(e)(1) AND IN RESPONSE TO EPIC  
GAMES, INC.'S ADMINISTRATIVE  
MOTION TO SEAL PORTIONS OF ITS  
EXPERT WRITTEN DIRECT  
EXAMINATIONS (DKT NO. 509)**

1 I, Benjamin Kung, declare as follows:

2 1. I am a Director in the Financial Planning & Analysis (“FP&A”) team at  
3 Spotify USA Inc. (“Spotify”), currently serving as our Head of Strategic Planning and Licensing  
4 Finance. I submit this declaration pursuant to Local Rule Civil 79-5(e) in support of sealing  
5 portions of Epic’s Expert Written Direct Examinations that are the subject of an Administrative  
6 Motion to Seal filed by Epic Games, Inc. (“Epic”) on April 28, 2021 (Dkt. No. 509).

7 2. I have worked at Spotify since March 2016 and have served in various roles  
8 within the FP&A team during that time. My current job responsibilities include overseeing teams  
9 that forecast and manage the economics of our music licensing deals, providing guidance and  
10 visibility to business teams and senior leadership on matters impacting Spotify’s consolidated  
11 margins, and long-range strategic planning for the company. I have personal knowledge of the  
12 facts set forth in this declaration and can testify competently to those facts.

13 3. Spotify is an indirect, wholly-owned subsidiary of Spotify Technology  
14 S.A., a publicly-traded company incorporated in Luxembourg. Founded in Sweden, Spotify  
15 operates the most popular global audio streaming service. Spotify’s streaming service first  
16 launched in Sweden in 2008 and launched in the United States in 2011. Spotify is available in 178  
17 markets, and its platform is used by 356 million monthly active users.

18 4. The market for audio and music streaming apps and app distribution on  
19 various platforms is highly competitive and includes several of the largest tech companies in the  
20 world, including Apple. Because Spotify does not directly control a widely-used channel for  
21 distributing its audio streaming app to a large number of users, our business model not only  
22 depends on our ability to acquire content or negotiate licenses with content rights holders on  
23 favorable terms, but also requires us to simultaneously negotiate with distribution partners to keep  
24 distribution fees and commissions as low as possible. To optimize our distribution and user growth  
25 strategies against these variables, Spotify employs significant resources with respect to research  
26 and development, data collection, and analysis about user experience and behavior across various  
27 channels in order to successfully compete in the audio streaming market.

5. I have reviewed Epic’s Motion to Seal; the attached Declaration of M. Brent Byars; and excerpts provided by Epic of the unredacted portions of the Rebuttal Written Direct Testimony of Michael I. Cragg, Ph.D., that are identified in Mr. Byars’s Declaration as containing or describing Spotify’s confidential information. The following portions of Epic’s Expert Written Direct Examinations should remain under seal for the reasons stated in this declaration:

Portion of Document Sought to be Sealed	Evidence Offered in Support of Sealing
Cragg Testimony ¶ 9, bullet 3 (everything after “Moreover, the data Prof. Hitt analyzes actually shows that” in the final sentence)	Declaration of Benjamin Kung ¶¶ 7–12
Cragg Testimony ¶ 70 (everything after “This disaggregated presentation shows that” in the sixth sentence, through the end of the eighth sentence)	Declaration of Benjamin Kung ¶¶ 7–12
Cragg Testimony ¶ 70 (everything after “which it estimates led to additional marketing costs” at the end of the final sentence)	Declaration of Benjamin Kung ¶¶ 13–14
Cragg Testimony Figure 8 (except the caption and source)	Declaration of Benjamin Kung ¶¶ 7–12
Cragg Testimony ¶ 71 (all content except “This finding is consistent with” in the first line, and “thus serves to show lack of substitutability away from iOS in-app purchases” in the last two lines)	Declaration of Benjamin Kung ¶¶ 15–16

6. In an effort to narrowly tailor its sealing requests, Spotify does not request sealing of paragraphs 65 or 69 of the Rebuttal Written Direct Testimony of Dr. Cragg; the first five sentences of paragraph 70 of the Rebuttal Written Direct Testimony of Dr. Cragg; the caption or the source of Figure 8 of the Rebuttal Written Direct Testimony of Dr. Cragg; or footnote 10 of the Rebuttal Written Direct Testimony of Dr. Cragg. Although the information reflected in some of these portions of Apple’s Expert Written Direct Testimony is non-public, Spotify recognizes the Court’s need to balance Spotify’s interests against the public’s interest in access to court records and has sought to narrow its sealing requests as much as possible.

7. The final sentence of bullet 3 of paragraph 9 of Dr. Cragg’s Rebuttal Written Direct Testimony describes the relative rate at which users of Spotify’s Free audio streaming service converted to Spotify’s Premium service on iOS devices compared with Android devices. Likewise, the sixth through eighth sentences of paragraph 70 of Dr. Cragg’s Rebuttal Written Direct Testimony also describe the Free-to-Premium conversion rates for users on iOS devices relative to users on Android devices at different points in time. These descriptions appear to be based on data contained in a document that was produced by Spotify, bearing production number SPOT-EPIC-00001448, in response to subpoenas served on Spotify by Epic on December 2, 2020, and by Apple on December 8, 2020 (the “Subpoenas”). I understand that when Spotify produced this document to Apple and Epic, it designated that document as “SPOTIFY HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL EYES ONLY” pursuant to the Supplemental Protective Order Governing Discovery from Spotify that was filed jointly by Apple and Epic at Spotify’s request and was entered by the Court in this litigation on February 11, 2021 (“Supplemental Protective Order”) (Dkt. No. 407).

8. Similarly, Figure 8 of Dr. Cragg’s Rebuttal Written Direct Testimony is a chart that reflects the relative growth in the proportion of Spotify app users on iOS and Android who subscribed to the Premium service from February 2015 through September 2019. This chart was also created using data contained in the document that was produced by Spotify bearing production number SPOT-EPIC-00001448.

9. Spotify would be competitively harmed in its business if the descriptions of the relative Free-to-Premium conversion rates for Spotify’s app on iOS and Android devices contained in paragraphs 9 and 70 and Figure 8 were disclosed publicly. This information reflects Spotify’s proprietary, internal data and analysis concerning the use of its app across different platforms and operating systems. This is highly sensitive information that Spotify keeps confidential and does not disclose to the public. Spotify was only willing to produce the data reflected in paragraphs 9 and 70 and Figure 8 of Dr. Cragg’s Rebuttal Written Direct Testimony in this litigation subject to the protections of the Supplemental Protective Order, which restricts access to the documents containing the data to outside counsel, experts, and trial consultants for

1 the parties and to the court and its personnel. To maintain the confidentiality of the data reflected  
2 in these portions of Dr. Cragg's Rebuttal Written Direct Testimony, Spotify invests in data security  
3 measures to prevent unauthorized outside parties from accessing the information, and even restricts  
4 access to this data within the company.

5 10. Spotify uses the data reflected in paragraphs 9 and 70 and Figure 8 of Dr.  
6 Cragg's Rebuttal Written Direct Testimony for a variety of strategic business purposes, including  
7 but not limited to:

- 8 a. developing business strategies to compete with other audio and music  
9 streaming app providers, including Apple;
- 10 b. identifying and negotiating with potential distribution partners to broaden  
11 the availability of the Spotify app across multiple platforms and expand  
12 Spotify's subscription business; and
- 13 c. planning strategic corporate investment decisions to drive sustainable  
14 growth and remain competitive in the marketplace.

15 11. If the information in paragraphs 9 and 70 and Figure 8 of Dr. Cragg's  
16 Rebuttal Written Direct Testimony were disclosed publicly, it would give Spotify's competitors  
17 insight into Spotify's internal data and analysis concerning its business operations and relative  
18 market share on iOS and Android, including trends in those areas over time. Such information can  
19 be used by Spotify's competitors to inform their own business and marketing strategies with  
20 respect to product strategy, distribution, and advertising. For example, competing app developers  
21 could use the information to understand trends in Spotify usage on iOS and Android and then  
22 selectively devote their resources to optimize their apps differently. And the competitive harm to  
23 Spotify resulting from any public disclosure of these portions of Dr. Cragg's Rebuttal Written  
24 Direct Testimony would be amplified because Spotify's competitors generally do not make the  
25 same level of platform-specific usage and subscription detail publicly available.

26 12. If paragraphs 9 and 70 and Figure 8 of Dr. Cragg's Rebuttal Written Direct  
27 Testimony were publicly disclosed, the information would also unfairly disadvantage Spotify in  
28 its negotiations with distribution partners (including original equipment manufacturers such as

1 mobile, TV, gaming, and auto partners, as well as app providers and commercial partners), and  
2 advertisers. If this material were to fall into the hands of distribution platforms or partners, for  
3 example, it would undermine Spotify's position in negotiations, undercut deal terms, drive up the  
4 prices Spotify would pay (consequently impacting its margins), and generally harm Spotify's  
5 ability to compete and grow its business.

6 13. The final line of paragraph 70 of Dr. Cragg's Rebuttal Written Direct  
7 Testimony reflects Spotify's estimate of the additional marketing costs that Spotify incurred  
8 attributable to the marketing restrictions that Apple imposed on Spotify following Spotify's  
9 decision to discontinue the ability for users to make in-app purchases in Spotify's app for iOS  
10 devices. The number was taken from a document that was produced by Spotify, bearing  
11 production number SPOT-EPIC-00000925, in response to the Subpoenas. I understand that when  
12 Spotify produced this document to Apple and Epic, it designated that document as "SPOTIFY  
13 HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL EYES ONLY" pursuant to the  
14 Supplemental Protective Order.

15 14. Spotify would be competitively harmed in its business if the estimate of  
16 Spotify's increased marketing costs reflected in the last line of paragraph 70 were disclosed  
17 publicly, because Spotify's audio streaming app competitors could use this number to assess the  
18 extent of Spotify's marketing expenditures on iOS devices and use that to inform their own  
19 business and marketing strategies with respect to product strategy, distribution, and advertising.

20 15. Paragraph 71 of Dr. Cragg's Rebuttal Written Direct Testimony  
21 summarizes proprietary analysis that was undertaken by Spotify to understand the impact of  
22 Apple's marketing restrictions on Spotify's ability to get users to subscribe to Spotify's Premium  
23 audio streaming service. This summary was based on discussions of that analysis—including  
24 descriptions of the methods Spotify used to conduct the analysis—contained in documents that  
25 were produced by Spotify, bearing production numbers SPOT-EPIC-00000932 and SPOT-EPIC-  
26 00001023, in response to the Subpoenas. I understand that when Spotify produced these  
27 documents to Apple and Epic, it designated them as "SPOTIFY HIGHLY CONFIDENTIAL –  
28 OUTSIDE COUNSEL EYES ONLY" pursuant to the Supplemental Protective Order.



**ATTESTATION**

I, Brendan P. Cullen, am the ECF User whose ID and password are being used to file this document with the Clerk of the Court using CM/ECF, which will send electronic notification of such filing to all registered counsel. In compliance with Local Rule 5-1(i)(3), I hereby attest that all signatories concur with this filing.

Dated: May 3, 2021

/s/ Brendan P. Cullen

Brendan P. Cullen